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Advanced Topics for In-House Attorneys

**Developing a “Get to Yes” Strategy
for Your Investment Transaction**

DEVELOPING A “GET TO YES” STRATEGY FOR YOUR INVESTMENT TRANSACTION

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AGENDA AND PURPOSE

- Steps to “Getting to Yes” when dealing with high-risk jurisdictions
- Navigating CFIUS, export controls, and sanctions
- Considerations through the lifecycle of a transaction
 1. Letters of Intent
 2. Due Diligence
 3. Negotiating Agreement Terms
 4. Post-Closing Considerations
- Q&A
- Appendix – includes sample provisions used in different agreements

TIMELINE FOR AN INVESTMENT TRANSACTION

- Letter of Intent
- Due diligence
- Terms negotiations
- Post-closing obligations

LETTER OF INTENT CONSIDERATIONS

- Letter of Intent – sets out key terms of a transaction agreed on in principle by the parties prior to due diligence and drafting of definitive transaction documents.
- Conditions – Obtain Regulatory Approvals
 - a) CFIUS
 - b) Export Authorizations related to key technology
 - c) Other regulatory approval (e.g., Chinese government approval for outbound acquisition/investment, foreign exchange controls)

DUE DILIGENCE CONSIDERATIONS

- Economic & Trade Sanctions
 - a) Primarily target individuals and entities (SDNs)
 - b) Broad prohibitions (*e.g.*, embargoes, sectoral sanctions) may apply depending on the country
 - c) Can be primary and/or secondary in effect
 - d) Mostly administered by OFAC (currently 38 programs)
 - e) Department of Commerce maintains Entity List – prohibits certain exports / limits export licensing authorizations
 - f) Russia example – multiple jurisdictions at play



DUE DILIGENCE CONSIDERATIONS

- Economic & Trade Sanctions
 - a) Screen all parties involved (including any relevant financial institutions)
 - b) Consider whether any high-risk countries involved
 - c) Request information regarding the target's sanctions screening practices (or as the target, expect questions relating to sanctions screening procedures) and any prior involvement with sanctions issues



DUE DILIGENCE CONSIDERATIONS

- CFIUS
 - a) The Committee on Foreign Investment in the United States (“CFIUS”) is an interagency committee that was created to review national security risks of certain forms of foreign investment in the U.S. economy, with authority to review “Covered Transactions,” including any transaction by or with any foreign person which results or could result in control of a U.S. business by a foreign person
 - b) Regulations recently (2018) amended such that certain transactions mandate disclosure to CFIUS (previously all disclosures were voluntary unless unilaterally initiated by CFIUS), potentially including non-controlling investments

DUE DILIGENCE CONSIDERATIONS

- CFIUS

Two types of foreign investment transactions now may require CFIUS Declarations (subject to a specific determination)

- Foreign Government Direct or Indirect Substantial Interest
- Critical Technology Requiring Export Control Authorization

DUE DILIGENCE CONSIDERATIONS

- CFIUS

Other relevant considerations:

- Where the parties to the transaction are incorporated and conduct business
 - Is there an Excepted Investor?
- Is the U.S. entity a U.S. Government Contractor?
- Is the U.S. entity a sole source for any products?

DUE DILIGENCE CONSIDERATIONS

- CFIUS
 - CFIUS Assessment is necessary to determine if a mandatory declaration is required for the proposed investment
 - It is critical to conduct assessment early in the transaction life cycle
 - Mandatory filings must be submitted at least 30 days prior to the completion date of the transaction



DUE DILIGENCE CONSIDERATIONS

- CFIUS Assessment:
 - a) Is there a Critical Technology involved?
 - b) Is critical infrastructure or sensitive personal data of U.S. citizens involved?
 - c) Does the proposed transaction involve a TID U.S. Business?
 - d) Assess full ownership-chain of parties involved
 - e) Determine whether a filing with CFIUS is required, recommended, or likely unnecessary

DUE DILIGENCE CONSIDERATIONS

- CFIUS Filing Contents / Procedures

Declaration vs. Notice Considerations:

- Both are joint submissions that require input from buyer and seller (investor and target)
- Declaration- shorter submission and review process, but no guarantee of CFIUS decision
- Notice – longer submission and review process, but guarantees ultimate outcome



DUE DILIGENCE CONSIDERATIONS

- CFIUS Filing Contents / Procedures
 - Generally, more questions from CFIUS members are directed toward the U.S. business, but ownership of foreign party to the transaction is key
 - U.S. business typically leads the draft, but it is jointly prepared
 - Filing timeline – draft (~30 days) → submit draft → draft review (~10 days) → update and submit final filing → acceptance (~7 days) → CFIUS review begins



DUE DILIGENCE CONSIDERATIONS

- Strategy for CFIUS Approval:
 - a) Consider rights granted to foreign investor
 - b) Scope of involvement in day-to-day activities
 - c) Can Critical Technology(ies) be carved out?
 - d) Scope of access to “material nonpublic technical information”
 - e) Willingness of parties to accept limiting conditions?



DUE DILIGENCE CONSIDERATIONS

- Export Controls
 - a) International Traffic in Arms Regulations (“ITAR”)
 - b) Department of State’s Directorate of Defense Trade Controls (“DDTC”)
 - c) Controls defense articles (including technical data), defense services, and certain brokering activities
 - d) United States Munitions List (“USML”)

DUE DILIGENCE CONSIDERATIONS

- Export Controls
 - a) Export Administration Regulations (“EAR”)
 - b) Department of Commerce’s Bureau of Industry and Security (“BIS”)
 - c) Controls commercial and “dual use” (*i.e.*, items with both commercial and military applications) goods, software and technology
 - d) Commerce Control List (“CCL”)



DUE DILIGENCE CONSIDERATIONS

- Export controls may require authorization for:
 - Export of products or technology from the U.S.
 - Re-exports abroad of U.S.-origin items
 - Export abroad of foreign-made items with U.S. content or made with U.S. technology
 - Disclosure of technology, source code or technical data to a Foreign Person in the U.S. or abroad



DUE DILIGENCE CONSIDERATIONS

- **Not** Foreign Person
 - U.S. Citizens
 - Lawful permanent residents (*i.e.*, “Green Card” holders)
 - Refugees and Asylees
- **Everyone else** is a Foreign Person, even if resident in the U.S.
 - Anyone on a nonimmigrant visa (*e.g.*, H-1B (worker) or B-1 (visitor))
 - Anyone not in the U.S. legally



DUE DILIGENCE CONSIDERATIONS

- Whether export authorization is required depends upon:
 - Jurisdiction and Classification of the hardware, software, and/or technology on export schedules (e.g., USML or CCL)
 - Intended End-Use(s)
 - Country(ies) of End-Use
 - Intermediate and Ultimate end-user(s)

NEGOTIATING AGREEMENT TERMS

- Economic & Trade Sanctions
- Representations / warranties regarding sanctions status of parties to the transaction, as well as company individuals

NEGOTIATING AGREEMENT TERMS

- CFIUS
 - a) Language regarding parties' determination CFIUS filing not required OR
 - b) Language regarding “acceptable CFIUS outcomes”
 - c) Timing considerations / deadlines in the agreement
 - d) Carve out in the event CFIUS unwinds the transaction
 - e) Scope of mitigation measures parties may consider
 - f) Plan of action in the event CFIUS cannot conclude its assessment based on a Declaration filing
 - g) CFIUS termination / deposit

NEGOTIATING AGREEMENT TERMS

- Export Controls
 - a) Will foreign party need access to export controlled technology?
 - b) ITAR Notice (e.g., 60-day notice) required?
 - c) ITAR Notice of Material Change (e.g., 5-day notice) required?

POST CLOSING CONSIDERATIONS

- CFIUS
 - Implementing any CFIUS mitigation requirements
 - CFIUS may unilaterally initiate review of a transaction

POST CLOSING CONSIDERATIONS

- Export Controls
 - Add required party / parties to existing licenses
 - Firewall non-U.S. persons from access to export-controlled products / technical data

POST CLOSING CONSIDERATIONS

- Compliance Audit
 - Audit compliance program of the target to make sure it is implemented / make sure nothing was masked (anti-corruption / sanctions)
 - Integration into existing plans / programs
 - Require compliance program if none exists
 - Identify any claims post-closing



YOUR QUESTIONS?

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